## BRIEF IN SUPPORT OF PETITION.

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**JURISDICTION INVOLVED.** The jurisdiction of this court to grant the Writ is invoked under 240(a) of the Judicial Code as Amended by the Act of November 13, 1925 (42 Stat. 1938, 28 U. S. C. A. § 47). The judgment of the United States Circuit Court of Appeals was made final by the denial of a rehearing on June 23, 1941, and the petition is filed within the statutory period.

**OPINION BELOW.** The opinion below appears in the record at pages 148-156 and is also published in the advanced sheets of the Federal Reporter (121 F. (2) 371). The following points were decided:

1. "Under railroad reorganization * * * the Interstate Commerce Commission has power to fix the maximum for each counsel and to set the maximum so low as to deny any compensation to attorneys claiming to have rendered services in connection with reorganization."

2. "Provision of Bankruptcy Act giving Interstate Commerce Commission authority in railroad reorganization proceeding to fix maximum limits of attorney's fees to be allowed out of debtor's estate is not objectionable because of failure to give right to judicial review of ruling of the administrative body."

3. "The power of Congress to deal with bankruptcy carried with it the right to select the tribunal, even going outside of courts, to administer debtor's estate."

4. "Railroad bankruptcy act making provision for compensation for legal services in reorganization proceeding by permitting Interstate Commerce Commission to determine reasonableness and value of services violates no constitutional right."

The opinion cannot be reconciled with another opinion rendered by the same court during the pendency of the rehearing and which referred to the decision in the instant case (*Re Chicago & N. W. Ry. Co.*, 121 F. (2) 791, 798).

## ARGUMENT.

### I.

**The Law Announced by the Seventh Circuit That Under Its Bankruptcy Powers Congress May Substitute Administrative Bodies as Tribunals in Lieu of the Courts Is Contrary to the Decisions of This Court That the Constitutional Limitations Also Apply to Congress in the Exercise of Its Bankruptcy Powers.**

In justifying the action of the Commission in passing judicially on the question whether petitioners were entitled to *any* of the expenses and compensation which the District Court held it had no power to reject, *no matter how valuable the services were to the estate*, the opinion states (R. 154):

> "In the first place, the power of Congress to deal with bankruptcy carries with it the right to select the tribunal, even going outside of the courts to administer debtor's estate."

Under such a power Congress may create administrative "tribunals" to adjudicate all rights involved in the field of bankruptcy. *This is in the teeth of the decisions of this court.*

This is irreconcilable with the construction of the section by the same circuit in its opinion rendered June 6, 1941 (*Re Chicago & North Western R. R. Co., Supra*) which it considered in connection with the rehearing (R. 258). There it said:

> "Two positions are taken in respect to the powers granted by this section to the District Court. **One asserts the duty of the District Court is somewhat clerical**—entering orders approved by the I. C. C. * * * **But neither the scheme of the legislation nor the words**

> **of the statute justify the conclusion that the court was to delegate its judicial powers to the I. C. C. and merely sign the orders** that the I. C. C. advised, or approve other orders which the I. C. C. made."

The court also said:

> "In the field wherein it exercised the powers expressly given it, the findings of the I. C. C. are well-nigh conclusive. True, **it may not be said that the orders of the I. C. C. are unassailable if wholly lacking in evidentiary support.**" (Bold type supplied.)

In further construing § 77 c (12) and the distinct powers of the court and the Commission, the opinion said:

> "This express and unqualified power was conferred upon the *District Court*, and this is the most important and determinative provision of the Act so far as defining the relative powers and jurisdictions of the court and the I. C. C."

This cannot be reconciled with the opinion in the instant case.*

(a) *The Bankruptcy Power of Congress Is Subject to Constitutional Limitations.*

The power of Congress in dealing with bankruptcy is not unrestricted and is subject to the limitations of the due process clause contained in the Fifth Amendment (*Louisville Bank* v. *Radford*, 295 U. S. 555). There it was said:

> "The bankruptcy power, like other great substantive powers of Congress, is subject to the Fifth Amendment."

In its exercise of its power under the bankruptcy law, *Congress is limited by the due process clause* of the Fifth Amendment (*Kaufner* v. *Irving Trust Co.*, 299 U. S. 445).

* The opinion quoted from the Congressional Record (R 151-2) to show the scheme of the framers of the act "whereby the I. C. C., not the District Court, should fix the maximum allowance to attorneys, and within that allowance the court was to exercise its judgment". Query, what judgment could it exercise within the maximum limit of zero? The scheme (R. 152) shows no discretion was to be lodged in the courts.

There can be no due process where judgment is entered by a "tribunal" consisting of an *administrative agency. The term "case"* under Article III, section 2 of the Constitution, which vested the judicial power in the courts, *includes bankruptcy* (*Re: American State Public Service Company,* 12 Fed. Supp. 667, 678, affirmed 81 F. (2) 721, 727, C. C. A. 4, Certiorari denied 297 U. S. 724). The decision in the instant case that Congress could oust the courts from jurisdiction in bankruptcy and select administrative bodies as "tribunals" is in *conflict* with the above decisions.

(b) *The Bankruptcy Power of Congress Is Subject to the Limitations Contained in Sections 1 and 2 of Article III of the Constitution.*

To the same extent that the Fifth Amendment operates as a limitation on the power of Congress in dealing with bankruptcy not to deny due process of law, sections 1 and 2 of Article III of the Constitution also operate as a limitation on the power of Congress to substitute administrative bodies for courts as "tribunals." *There cannot be a due process of law when an administrative body is substituted for a court,* in violation of sections 1 and 2 of Article III of the Constitution. The Commission is not a court. Its members are only appointed for a seven year term. It is an administrative body not vested with judicial powers.

In *Farrell* v. *Waterman S. S. Co.,* 291 Fed. 604, the court quoted at great length from the decision of this court in *Martin* v. *Hunter,* 1 Wheat. 304, considering sections 1 and 2 of Article III of the Constitution. It pointed out that under section 1, the judicial power is vested in the courts and under section 2 the judicial power extends "to all cases in law or in equity." In the quotation from the decision of this court, this court asked "Could Con-

gress vest it (the judicial power) in any other person?" This court answered it in the negative. In *Benson* v. *Crowell,* 33 F. (2) 137, Affirmed 45 F. (2) 666, Certiorari allowed (283 U. S. 814), and affirmed (285 U. S. 22) the court quoted from another decision by this court in *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 280, the following (pp. 139):

> "That the auditing of accounts of a receiver of public money may be, in an enlarged sense, a judicial act must be admitted * * * it must be admitted that, in auditing of this account, and the ascertainment of its balance, and the issuance of this process, *was an exercise of the judicial power of the United States, the proceeding void;* for the officers who performed these acts *could exercise no part of that judicial power.* They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform any of the ministerial duties which arise out of judicial proceedings."

The court asked (p. 141):

> "Was the court to make its order without any hearing of the facts, to submit its judgment to the domination of the Deputy Commissioner because the act said to do it, if so, *would not this of itself be an unconstitutional requirement?*"

The court concluded that in order to give validity to the Act it was necessary to construe it so that the District Court *had the power and duty to hear the facts* and to determine the law in order to enter judgment from which a review could be taken. In affirming this decision this court said (285 U. S. 22 at page 56):

> "In relation to these basic facts, the question is not the ordinary ones as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. **It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions.** It is the question whether the Congress may substitute

for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner —for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, **does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system,** wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

* * *

"In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding *tribunal* is unavailing, as the contention makes the *untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence* even though a constitutional right may be involved" (Emphasis supplied.)

In *Missouri Pacific Railroad Company Reorganization* (212 I. C. C. 662) in construing section 77, the Commission said (page 665):

"As we read the statute, however, *it is the function of the court and not of this Commission to determine whether compensation for services such as were performed by the counsel for the mortgage trustees is a proper charge against the general estate of the debtor.* We proceed *on the assumption* that the judge referred the petition to this Commission for the fixing of maximum limits of reasonable compensation for the services rendered *on the assumption that the claim was*

> *properly payable out of the debtor's estate* and involved expenses in connection with the proceedings and plan, because it is only to allowances for expenses of this nature that subsection (c)(12) relates." (Italics ours.)

In *Erie Railroad Company Reorganization,* 240 I. C. C. 673, the Commission said at page 694:

> "* * * we consider that it is the function of the court, *and not our function,* to determine whether, and to what extent, such allowances constitute a proper charge against the estate of either of the debtors in this proceeding. The matter has been referred to us by the court, and our findings as to maximum limits of allowances are made pursuant to such reference."

In *New York, New Haven & Hartford Railroad Company Reorganization,* 236 I. C. C. 373, the Commission said at page 379:

> "However, *this petition has been referred to the Commission by the court for the determination of a maximum limit of allowance,* subject to the reservation hereinbefore stated, and we find that such determination is within the scope of the Commission's function under the statute. In fixing a maximum limit of allowance for the services of this petitioner, *we do not deem it to be our duty under the statute to determine whether any allowance should be made to the petitioner out of the debtor's estate.* We regard it as the *exclusive function of the court to decide the question of the propriety of any payment.*" (Italics ours.)

The decision in the instant case which justified the judicial determination of the Commission that petitioners were not entitled to any of their expenses and compensation is, therefore, in direct conflict with the decisions of this court and with the construction of the powers of the Commission as construed by the Commission. **The construction of the functions of the Commission in the other cases was binding upon it in the instant case (New York Cent. Sec. Corp. v. United States, 287 U. S. 12).**

(e) *Congress Did Not Select the Commission as a Tribunal, and It, Therefore, Had No Jurisdiction to Pass Judicial Judgment.*

Even if Congress had the power to select the Commission as the court under its bankruptcy power, *it has not seen fit to do so.* § 77 lodged the judicial power in the court. The Commission was only vested with the power to render a report to the court. *The allowance was to be made by the court and not by the Commission.* The appeal allowed by the act is not from its determination but from the order of the court. Such a review implies power and duty to pass on the facts. (*Benson* v. *Cromwell, supra,* 33 F. (2) 137.) This court has held that the functions of the Commission under section 77 are "administrative functions" and the functions of the courts are "judicial functions". (*Warner* v. *Palmer,* 312 U. S. 132.) The reasoning of the decision in justifying the acts of the Commission is, therefore, contrary to the construction of this act as given by this court. It is irreconcilable with the construction of this section in the opinion of the same court in *Re Chicago and North Western Railway Company, supra.* There it said:

> "Our conclusion is that the jurisdiction—and the exclusive jurisdiction—of all matters relating to the estate of the debtor is in the court. Also, that the I. C. C. has a most important function to perform—that of preparing the data, studying the same, and finally recommending a plan of reorganization, which must, however, be ultimately approved by the court. To give it legal effect, the court **must act judicially.**"

## II.

**The Power of the Commission Was Limited to a Determination of the Total Maximum Allowances and No Power was Conferred Upon It to Pass on the Individual Allowances and Disallowances.**

Section 77(c)(12) provides that the court "may make allowances to the parties within such maximum limits as are fixed by the Commission."* In the instant case the Commission fixed the "maximum limits" at $312,624 (R. 71). It transcended the limits of its jurisdiction when it proceeded to make allowances to *each* of the parties and *passed on the right to any allowances* to some of the parties and determined that petitioners were not entitled to anything (R. 79).

### (a) *The Intent of the Act Was to Vest in the Commission the Power to Fix the Total Burden of the Expenses.*

It was the intent of Congress to allow to the Commission the power to limit the maximum expenses or burden of the estate and to leave it to the courts to make the individual allowances. Even a court must arrive at a maximum limit

* Section 77(c)(12):
"Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)."

that an estate will bear before it can determine separate allowances (*Irving-Austin Building Corporation,* 100 F. (2) 574, 579). It was not the intent of Congress *to strip the courts of their functions and to vest judicial duties in the administrative body.* The implication and intendments arising from the language of a Statute are a material part of it as if they had been expressed (*U. S.* v. *Sischo,* 262 U. S. 165). The legislative intent must be determined from the act as a whole (*Grier* v. *Kenna,* 64 F. (2) 605).

*When the Commission arrived at its conclusion on the maximum limits and fixed it at $312,624* (R. 71) *its powers were at an end.* The subsequent acts to make the allowances and *disallowances* were wholly *foreign to its powers* and it was the duty of the court to disregard the Commission's order and to pass on the rights of the parties based on the evidence.

(b) *The Commission Recognized the Limits of Its Power as Contended by Petitioners.*

The Commission itself recognized in other cases that it had no jurisdiction to determine whether or not expenses or allowances should be made by it and *that this was a matter for the court to decide* (*Re Mo. Pacific R. Co. Reorganization, supra,* 212 I. C. C. 662, 665). In *Chicago & Eastern Illinois Railway Company Reorganization,* it determined that the term "allowances" meant different allowances during the progress of the case. There it said (212 I. C. C. 491, 493):

> "The Reconstruction Finance Corporation objects to the petition on the ground that the acts does not contemplate interim allowances, but provides for the fixing of one maximum allowance at the end of the proceeding after all services have been performed and may be appraised. But the act clearly provides that we shall *fix maximum allowances at such time or times as we may deem appropriate.*"

The opinion states (R. 153):

> "There is some support for the contention that the I. C. C.'s power was limited to fixing the maximum allowance for *all* attorneys; leaving it to the District Court to determine the amount each individual lawyer should receive, but limiting the total of all allowances, to the maximum fixed by the I. C. C."

It held, however, that the term "allowances" is contrary to the contention. It overlooked the construction of the term "allowances" made above by the Commission. It held the word "allowances" refers to allowances from time to time during the proceedings. **The commission's construction made in other cases should have been followed** (*New York Cent. Securities Corp.* v. *United States,* 287 U. S. 12).

## III.

### The Power to Fix Maximum Limits Does Not Embrace the Power to Fix Zero Limits.

The Commission is an administrative body and its jurisdiction is circumscribed within the limits of its power. Nothing will be inferred in favor of its jurisdiction.

#### (a) *The Word "Nothing" Cannot Be Stretched to "Maximum".*

Section 77(c)(12) directed the Commission to fix the "*maximum*" limits. If the opinion is correct in the interpretation that "maximum limits" means "nothing" and the District Court could not exceed the "maximum limit" of "nothing" then if carried to its *logical conclusion,* if the Commission had fixed the *total maximum fees for all parties* at "nothing", the court would be powerless to make *any* allowances. *The absurdity of such a proposition is apparent.*

(b) *"Maximum" Is Opposed to "Minimum" and "Nothing" Cannot Be Reconciled With Either.*

The Commission was *not authorized to fix the lowest amounts* but to fix *"the maximum limits"*. The Commission in the instant case fixed "zero" or "nothing" under the *guise* of "maximum" limits. The term "maximum" is defined (Webster's New International Dictionary, 1925 Ed. p. 1333) as follows:

> "The greatest quantity or value attainable in a given case; or, the greatest value attained by a quantity which first increases and then begins to decrease; the highest point or degree;—opposed to *minimum.*"

The term "nothing" is defined (p. 1472) as follows:

> "Absence of all magnitude or quantity, however small, also a cipher; a zero; * * * that which is characterized by utter absence of determination."

This is synonymous with "zero" which is defined (p. 2369):

> "A constant less than any assignable magnitude or quantity; nothing; the lowest point; nothingness; nullity."

The decision holds that the Commission "having fixed a maximum limit" at "nothing" the District Court could not make any allowance "in excess of that 'nothing' ". The opinion states (R. 153) that the commission was *"empowered and required to fix the ceiling,*—the maximum of fees on expenses". This "ceiling" cannot be reduced to the "bottom" of "nothing".

In *Croghan* v. *Savings Trust Co.*, 85 S. W. (2) 239, (Missouri, 1935), the court asked (p. 242):

> "What is nothing?"

It answered:

> "Lexicographers usually define it as naught; that which is non-existent; a non-entity. Shakespeare defines it through the mouth of Bassanio, as follows: 'Gratiano speaks an infinite deal of nothing, more than

> any man in all Venice. His reasons are two grains of wheat hid in two bushels of chaff, you shall seek all day ere you find them, and when you have them, they are not worth the search.' Merchant of Venice, Act I, Scene 1."

We would not have gone to Missouri nor would we have resorted to Shakespeare to have "*much ado about nothing*" were it not for the fact that services rendered during a period of five years were not compensated by the application of the word "nothing." If one should seek "all day" the word "nothing" in the word "maximum" his efforts will amount to nothing. The word "maximum" is the antonym of "minimum" and "nothing" is less than "minimum" and is certainly not a "maximum." The term "maximum" is defined by the Supreme Court of Illinois in *Moweaqua Coal Corp.* v. *Industrial Commission,* 360 Ill. 194, at page 200, as follows:

> "There is, so far as we are advised, neither difference in nor shades of meaning given by lexicographers and the courts to the word 'maximum.' It is universally defined to mean the highest or greatest amount, quality, value or degree. Webster's New Int. Dict.; Century Dict. 1913 ed.; 6 Oxford Dict. 1908, p. 254; Funk & Wagnalls New Standard Dict.; *Trustees of Schools* v. *Berryman, supra; In re Hanaca, supra; Poolman* v. *Langdon, supra.*"

The Commission therefore exceeded its jurisdiction and it was the duty of the District Court to reject its report. Therefore, the Seventh Circuit erred in affirming the order of the District Court.

## IV.

**The Commission Acted Arbitrarily and Capriciously and It Was the Duty of the Court to Examine the Evidence and To Reject Such a Report, and the Seventh Circuit Erred in Upholding Its Decision on the Ground That the Court Was Powerless To Reject the Report.**

We raised the point before the Commission that the Commission's report is contrary to the evidence and that its report was *arbitrary* (R. 93-101). When the Commission denied the rehearing objections were filed in court raising this point (R. 110-115). The District Court did not overrule the objections on the ground that the evidence sustained the Commission's findings, but on the ground that *it had no right to review its findings* (R. 9).

(a) *The Denial of Compensation to the Petitioners Was Arbitrary, and It was the Duty of the District Court to Sustain the Objections and the Seventh Circuit Erred in Affirming Its Order.*

The petition for the reimbursement of expenses and for the allowance of fees was filed pursuant to the order of the District Court (R. 33-34). The petition for fees was verified (R. 13-23) and the testimony was that the *factual statements* set forth in the petition were true (R. 8). *The evidence was in no way contradicted.* The opinion states (R. 149) that the evidence *"corroborated" the statement contained in the petition.* The Commission stated (R. 70) that it was not persuaded that the evidence supports the statement that the services were beneficial to the estate.* A petition for rehearing was filed with Commission to show its error by a reference to the record (R. 81). There (pp. 93-100) it

* Petitioners were entitled to the independent judgment of the court on this issue as Section 77 (c) 12 vest the power in the court to make the allowances and this required its judicial determination of this issue (R. 9).

was pointed out (by references to the record)† that the intervenors, by their counsel, appeared before the Commission at the hearings on the Debtor's Plan at Washington, D. C. on August 5, 6 and 7, 1935, and that at that hearing *they were the only parties representing the entire class of the Adjustment Mortgage Bondholders* (as the Trustee under the bond issue was not yet a party to the proceedings). Petitioners took an active part in the hearings. They endeavored to bring out the unfairness of the plan as to this class. *They* brought out by their cross-examination (R. 3) that it was necessary under the proposed plan that *there be a net earning of at least* $7,500,000 in order to meet the fixed requirements under the plan *which was then sponsored by the Debtor and the Institutional Group* and by other parties; that based on the average actual net earnings for the previous three years *there would be a deficit of at least* $1,500,000 *per year,* so that if the plan were adopted in 1935, and if the revenue should not be greater than the average during the previous three years, *the Road would start with a default immediately.* They showed (R. 4) that the Plan was unfair as a whole for the reason that it left the various mortgages undisturbed, and the provisions under the General Mortgage fixing the definite interest for two-thirds and a contingent interest of one-third as *"cumulative"* would endanger (upon default which was then certain) the Fifty-Year Mortgage in a foreclosure which would follow. The cross-examination also developed (R. 4) that under that plan *there was a "cumulative" ten year contingent interest on the Fifty-Year Mortgage which became definite at the expiration* of ten years, and because of the insufficiency in the actual earnings *it would enable the mortgage trustee* to completely

† This record consisted of the stenographic report of the evidence before the Commission and the petition referred to the pages of such record (R. 94, 95, 96, 97, 98 and 99). This stenographic report was made a part of the record before the District Court (36 F. Supp. 193, 200-201) and was made a part of the record on review by the narrative statement (R. 2-8).

wipe out the *new preferred stock which was then offered* to the Adjustment Mortgage Bondholders in lieu of their bonds.

At the foregoing hearings, the Debtor and the Institutional Groups took the position that the Plan was fair, equitable and feasible and based their statements on their *prophetic forecasts.* Two years later when their *prophecies were shattered by actualities* they were compelled *to admit* that because of these objections the Plan could not be carried out, and they asked for a postponement and promised to remedy these defects (R. 4). They asked for an indefinite postponement without promising to present any better Plan at a definite date. Counsel for the intervenors argued the matter before the Commission and *urged the Commission to adopt a plan of its own* (R. 5). Thereafter, a new Plan was filed by the Institutional Groups which eliminated some of the objections, and the Commission *finally adopted a plan of its own.* This plan remedied the defects of the Debtor's Plan in that many of the mortgages were eliminated, the entire capital structure was *revised and the cumulative features were eliminated.* The evidence was therefore conclusive that petitioners have rendered valuable services to the estate, and they were entitled to payment for the services rendered (*Silver* v. *Scuttin Steel Co.,* 98 F. (2) 503; *Re Grocery Center, Inc.,* 83 F. (2) 617).* It was the duty of the Commission to grant the rehearing. It was the duty of the District Court to examine the record and to pass on the question whether the Commission's findings were based on the evidence.

The Act contemplates that the District Court should hear

* The respondents urged on the appeal that the evidence before the Commission was included in the record in narrative form (R. 1-8) and that the District Court did not have the benefit of the evidence in question and answer form. The narrative statement was made under Rule 75(c) for the reviewing court. This was based on the complete record in question and answer form, which was before the District Court. Such narrative statement was in compliance with the rule (*Hall* v. *Gordon,* 119 F. (2) 463) and the respondents who did not object to the statement were in no position to complain in the reviewing court.

evidence on the allowances of the fees. The approval of the order of the District Court on the ground that there was no evidence before the Court cannot be justified on any theory. The action of the trial court in denying compensation is not an absolute one. There must be some support for its conclusion (*Teasdale* v. *Safton Nat. Fibre Can Co.*, 85 F. (2) 379, 382, C. C. A. 8). An order of a court disallowing fees with a "manifest disregard of right and reason must be reversed (*Re National Dept. Stores,* 93 F. (2) 123, C. C. A. 3). That there was no right or reason for the denial is manifested by the statement of the District Court (R. 9). Neither the order of the District Court nor the order of the Seventh Circuit are reconcilable.

(b) *The Conclusion of the District Court That the Report of the Commission Was Binding Upon It No Matter How Arbitrary It Was Should Have Been Reversed by the Circuit Court.*

The act contemplates a hearing before the court on the allowances. The Commission was only vested with the power to fix the maximum limits, or, as the opinion says, "to fix the ceiling." It was not vested with the power to *fix the bottom.* The right to the allowances was a judicial function, which could only be performed by the court after hearing evidence (*Benson* v. *Cromwell,* 33 F. (2) 137). The discretion lodged in the court "must be exercised with judgment" and with "double purpose of doing equity" to those distressed and at the same time "rewarding faithful and necessary service with reasonable compensation" (*In re Herz,* 81 F. (2) 511, 12, C. C. A. 7). In order not to burden the court with new evidence, it was stipulated that the court may decide the matter upon the same evidence which was submitted to the Commission (R. 118). This contemplated a reading of the evidence and judicial determination based thereon. It did not contem-

plate that the court should disregard all evidence and abide by the decision of the Commission no matter how arbitrary it was. The conclusion of the District Court that no matter what the evidence showed as to the value of the services, it had no right to reject the Commission's report (R. 9) could not be sustained under any theory.*

(c) *The District Court Had the Entire Record for Its Consideration and It Was Its Duty to Pass on the Evidence, and the Court of Appeals Was Mistaken When It Said That the Record Was Not Before the Court.*

The record discloses that the District Court had before it the evidence which was presented before the Commission (R. 118). It also had before it the evidence presented to the Commission pertaining to the plan for which the services were requested (36 Fed. Supp. 193, 200, 201). It was the duty of the court to determine whether petitioners were entitled to their expenses and fees based on the evidence and not upon the arbitrary report of the Commission.

If it be true, as the District Court held, that the report of the Commission was binding upon it, and that the District Court had to carry out the *ministerial* duty to enter the order, then the provision in allowing an appeal from the decision of the District Court is meaningless. In *Benson* v. *Cromwell*, 33 F. (2d) 137, *supra*, the same argument was made by the court. It said (p. 141):

> "If the judgment of the court herein is to be reviewed, what error could be found by another court if the court was required by the act to enter judgment in the amount found by the Deputy Commissioner?".

* The view of the District Court which was affirmed by the Seventh Circuit is contrary to its own decision in an opinion rendered prior to the denial of the rehearing (*Re Chicago & Northern R. R. Co.*, 121 F. (2) p. 791, which was called to the court's attention and which it considered (R. 158). There the same court said that "neither the scheme of the legislature nor the words of the statute justify the conclusion that the court was to delegate its judicial powers to the I. C. C. and merely sign the orders which the I. C. C. advised, or approve other orders which the I. C. C. made."

There the court also said:

> "Was the court to make its order without any hearing of the facts, to submit its judgment to the domination of the Deputy Commissioner because the act said to do it, if so, would not this of itself be an unconstitutional requirement?"

The court, in answering these questions, concluded there that it was the duty to hear the matter *de novo*. This court affirmed that decision. In the instant case the court did hear the matter *de novo* when it was stipulated that the judgment of the court be rendered upon the same evidence which was heard by the Commission. There was no understanding, however, that the court was to ignore the evidence, and enter its judgment based upon the arbitrary judgment of the Commission.

Even in cases where the court does not hear the matter *de novo*, but merely acts as a reviewing court, the report of the administrative body in such cases is "somewhat like a Master in Chancery" and the court "would test" the report by "the evidence submitted" (*Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 527), and under such circumstances it was held that it necessitated an examination of the evidence. The decision of the trial court, which was affirmed by the Seventh Circuit, cannot be sustained on any theory.

(d) *If It Be True That the District Court Did Not Have Any Evidence Before It, Then It Was in No Position to Make Any Allowances and to Overrule the Objections.*

The opinion states (R. 155) that the District Court could not have rejected the arbitrary report of the Commission and could not have determined whether its report was arbitrary or not because "the evidence upon which this finding was made was not before the District Court."* If this were

* It is difficult to understand this statement in the opinion. If this finding was made on the evidence before the Commission in support of the petition for fees, then the evidence was before the court (R. 118) and the opinion conceded that the testimony before the Commission tended to corroborate this statement for fees. A narrative statement of

true, then the entire report of the Commission had to be rejected and there would be no basis for the entry of any order as the Court would have no evidence before it upon which to base any judgment. Under no theory would the respondents be entitled to the $312,624.

## V.

## Section 77, as Distinguished from 77B Authorizes Allowances of Expenses to Parties and Fees to Their Attorneys, Regardless of Benefits Rendered to the Estate.

The entire report of the Commission is based upon a misconception of law that under section 77 parties and their attorneys are not entitled to their expenses if no benefit resulted to the estate. The benefits resulting to the estate is a factor in determining the amount of the compensation but is not to be considered on the question whether *any* compensation or expenses should be allowed.

### (a) *There Is No Requisite Under Section 77 That Attorneys Representing Creditors Succeed in Their Efforts in Order to Entitle Them to Compensation.*

We have shown above that the intervenors and their counsel, the petitioners, have made valuable contributions to the estate. But, even if no benefits resulted to the estate, they were still entitled to the reimbursement of the expenses and to the compensation for their counsel. The Commission based its decision on the rule applicable to Section 77B which has no application to Section 77.

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such testimony appears in the record (R. 6-9). If the statements refer to the evidence before the Commission when the services were rendered, then such evidence was also before the court and a narrative statement of such evidence appears in the record (R. 2-6).

(1) *The Authorities Under 77B Are Inapplicable to Section 77.*

Section 77B requires that parties representing creditors *contribute beneficially to the estate. There is no such* requirement under Section 77. The Section authorized compensation to attorneys representing creditors *without regard as to whether the attorneys are successful or not.* The question is only whether they actually represented creditors who were parties to the record and whether they represented them on matters in which their rights were involved. All creditors who participated in bringing about the submission of the plan are entitled to reimbursement for the expenses and the compensation of the attorneys. The fact that the Court and the Commission allowed the intervention is to be considered in favor of the allowance of expenses and fees (*Steere* v. *Baldwin Locomotive Works,* 98 F. (2) 889).

(b) *The Commission Was Unable to Determine Whether the Services Were of Benefit to the Estate Prior to the Approval of the Plan by the District Court, and the District Court Was Unable to Determine Such Issue Prior to the Acceptance of the Plan by the Creditors.*

If the right to expenses and compensation be predicated on benefits resulting to the estate under Section 77, then neither the Commission nor the District Court were in a position to decide these issues on the state of the record.

(1) *The Commission Was Unable to Pass on the Question Whether the Services of the Petitioner Were Beneficial to the Estate Prior to the Approval of Its Plan by the District Court.*

The Commission rendered its report on the plan to which petitioner filed objections and suggested modifications on March 30, 1940 (R. 18-19). In the petition for fees

it was stated that in the event of the refusal to make the modifications petitioners would file objections in court seeking such relief, and in the event of the approval of the plan they would prosecute an appeal (R. 20). The objections to the plan were filed in court (R. 8). The Commission rendered its report on fees on October 7, 1940, finding therein that petitioners' services were not of value to the estate (R. 39). *The objections to the plan were then still pending in court and undisposed of.* It could not have *forecasted that the court would sustain its report.* It could not have based, at that time, its report on the fact that no beneficial services were rendered *before it knew whether its plan would be approved.* What if the court had sustained some of the objections?

Under 77B the plan is approved by the creditors in *advance* and the approval of the court *follows.* Therefore, unless the parties contributed something constructive to the modification of the plan which was approved by the creditors they should not be entitled to compensation. The situation under Section 77 is different as the Act provides that the plan is first to be approved by the Commission and by the court *before it is submitted to the creditors.*

In Section 77-B the allowance can only be made *after the approval of the plan by the creditors and by the court,* while under Section 77 *the allowance can be made even if the plan is rejected by the creditors and the court.* It is apparent therefrom that *the compensation under 77 is not measured by the approval or disapproval of the plan or by the contributions to the approval of the plan but by the services rendered leading up to the submission of the plan, regardless of its final success.* Section 77 (c) (12) allows compensation "for the actual and reasonable expenses, including reasonable attorneys' fees *incurred in connection with the proceedings and plan.*" It is *not conditioned* upon a contribution to the *final* adoption of the plan. The disallowance of the expenses of these intervenors and the fees of

their counsel is based on the *mistaken conception* that the law applicable to Section 77B is also applicable to Section 77, which is not the case, as shown above. This discussion is, however, only for *academic* purposes as appellants *did render valuable services* to the estate.

It is evident that the Act did not contemplate that the right to expenses and compensation of attorneys be determined by the Commission, based on benefits resulting to the estate.

(2) *The Court Was Unable to Pass on the Benefits to the Estate Until the Acceptance of the Plan by the Creditors.*

When the Court sustained the Commission's finding it knew that its judgment was not yet final as *the creditors had the right to reject the plan.* The court, therefore, was in no position to decide that issue at that stage of the proceeding. The appeal from the plan was prosecuted by these petitioners together with others, and it is still pending and undisposed of. The Circuit Court of Appeals took cognizance of the pendency of the appeal and considered petitioners' brief on the merits in connection with the petition for rehearing (R. 158). Petitioners were the only Appellants who appealed on behalf of the Adjustment bonds. The Trustee of the bond issue was not a party to the proceedings before the Commission pertaining to the Debtor's plan and did not become a party until after the filing of the Amended Plan in 1938. *No appeal was prosecuted by the Trustee of the bond issue,* but upon the filing of petitioner's brief on the merits on their appeal from the approval of the plan (which brief on the merits was considered by the Court in connection with the petition for rehearing) the Trustee filed an "Appellee's Brief" of *five* pages, *where it adopts the position of the Appellants.* We intend to file a motion in this court for leave to file copies of our brief on the merits as well as a copy of Trustee's

brief, due to the fact that our brief on the merits was considered by the Circuit Court of Appeals in connection with the rehearing. We also intend to ask leave to file a copy of the printed record insofar as it deals with a hearing before the Commission, which printed record will show the extent of the services rendered by the petitioners before the Commission at a date *when no other party represented this class.* It is significant to note that the Commission allowed *"nothing" to these petitioners* but did allow $18,715.00 to the Trustee and its counsel of this bond issue. The Respondents now contend on the appeal on the merits that the Trustee of the bond issue *"represents no one"* (p. 22). This is also the position of the Reconstruction Finance Corporation in its brief on the merits (p. 3). Being *the only representative of the class* and a party by intervention, it follows that petitioners were entitled to the reimbursement of their expenses and to the reasonable fees of their attorneys regardless of any benefit which might accrue to the estate, particularly in view of the pendency of the appeal which may still give greater benefits to the estate. It is, therefore, our position that Section 77 is wholly different from Section 77B and that *the act contemplates that parties who are let into the proceedings by the intervention are entitled to their expenses and to the expenses of their attorneys regardless of benefits resulting to the estate* and that the benefits may be considered in estimating the amount of the fees but not in considering whether any of the expenses and fees should be allowed.

(3) *Parties to the Proceedings or Those Who Were Let In by Intervention Are Entitled to Their Expenses and the Reasonable Fees of Their Attorneys, Regardless of the Success of Their Efforts.*

Section 77 c (12) authorizes the allowance of expenses of the parties and the compensation of their attorneys.

The court and the commission had the privilege to deny the intervention and petitioners would not have been parties to the proceedings, and if they performed any services they could not claim reimbursement for expenses and the fees of their attorneys. Both, however, the court and the Commission, *granted the intervention.* It must be assumed that *they properly exercised their discretion* and that the intervention was necessary. Petitioners, therefore, became parties to the proceeding by the orders of the court and the Commission. The Commission's power was, therefore, limited to fixing a "maximum" amount to expenses and fees, and the functions of the court were to determine the "reasonableness" of the charges. Neither the Commission nor the court had the right to deny the *total* fees and expenses. The rule that the powers of the court are limited in passing on the reasonableness of the amount but that the court is without power to deny *any* amount where the party comes within the Act was squarely held *In Re Building Development Company,* 98 F. (2) 844, C. C. A. 7. There the court also said (p. 846):

> "The rule which clearly is deductible from authorities is that where the party designated by the Act renders services in connection with the proceeding and plan, the court **may not,** unless some special justification, refuse to allow any compensation whatever."

Here, the Seventh Circuit failed to apply the rule which it announced above.

For the foregoing reasons we urge the issuance of the Writ.

Respectfully submitted,

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